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TABLE OF CASES

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 58

A. L. MECHLING BARGE LINES, INC., A CORPORATION, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, AND MAZON FARMERS ELEVATOR, APPELLANTS

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION

No. 59

BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

The opinion of the district court (R. 74) is reported at 209 F. Supp. 744 and its final judgment is set forth at R. 81. The report of the Interstate Commerce Commission (R. 9–29) is reported at 310 I.C.C. 437. The proposed report of the Commission's hearing examiner is set forth at R. 32–52.

JURISDICTION

The judgment of the district court was entered on September 18, 1962 (R. 81). Separate notices of appeal were filed by A. L. Mechling Barge Lines, Inc., et al. and the Board of Trade of the City of Chicago on November 16, 1962 (R. 82–87). Probable jurisdiction was noted on June 17, 1963 (R. 837). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

The provisions of section 4 of the Interstate Commerce Act enable the Commission to authorize rail and water carriers in special cases limited to direct lines or routes to charge shippers less for like transportation services of like kind of property performed over longer distances than for shorter distances, provided the applicable charges on the longer distances are shown to be reasonably compensatory. Carriers need no authority to establish such charges over circuitous lines and routes. The following questions are presented by this appeal.

1. Whether the Commission in authorizing relief from the long-and-short-haul provision of section 4 is required to pass upon allegations of rate unlawfulness arising at a point not on the direct routes, but on a

circuitous route which is not embraced in the order of the Commission?

2. Whether the Commission in a fourth section proceeding which is limited to determining whether a carrier should be authorized to establish reduced through charges to the more distant points and to maintain higher through charges to intermediate points, is required to determine finally whether a proportional rate factor which has no independent application, but is used only as a basis for figuring the through charge, violates other sections of the Act?

3. Whether the Commission in this case abused its discretion when it did not convert a proceeding limited to the specific issues of the fourth section into a general rate investigation?

4. Whether the Commission's findings that the proposed rates are not lower than necessary to meet the barge-rail competition and that the proposed rates do not constitute a destructive competitive practice were properly made upon the basis of the through rates to the more distant points, and whether such findings are supported by substantial evidence of record?

STATUTES INVOLVED

The provisions of the National Transportation Policy, 49 U.S.C. preceding section 1, sections 3(1), 3(4), 4(1), 13(1), and 15(7) of the Interstate Commerce Act; 49 U.S.C. sections 3(1), 3(4), 4(1), 13(1), and 15(7) are set forth in the Appendix, *infra*, pp. 51–55.

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STATEMENT

1. The New York Central Railroad Company operates a rail line running east and west between Moronts and Kankakee, Illinois, called the Kankakee Belt Line. The Kankakee Belt Line is about 80 miles long, and for a distance roughly parallels the Illinois River. The Illinois River near Morris, Illinois, swings in a northeasterly course toward Chicago and Lake Michigan. A. L. Mechling Barge Lines, Inc., is a water carrier operating on the Illinois River and it transports a substantial amount of corn from the territory adjacent to the river to Chicago. Some of this corn is reshipped to eastern destinations. Corn constitutes the major traffic available to the Belt Line from the surrounding area (R. 13–14). The transportation rate is one of the important factors which determines whether the corn is moved to the river for shipment by water carrier such as appellant Mechling, or to a country elevator for shipment by rail.

As a direct result of the development of commerce on the Illinois River beginning about 20 to 25 years ago, there was a drastic diversion of grain and corn traffic orginating in the territory adjacent to the Belt Line, from the all-rail route to the barge-rail route via Chicago, Illinois. Thus, the Commission found that "In 1935, 1940 and 1957, respectively, about 1.5, 19 and 59 million bushels of corn, moved by barge from all Illinois River ports to Chicago" (R. 13). Most of the corn moved by barge originated at ten river ports on the Illinois River which compete with the Belt Line stations. In comparison to the enormous increase in the barge movement of grain and

corn, only a nominal amount moved over the Belt Line. "During 1954, 1955, and 1956, respectively, 467, 729, and 615 carloads of grain including 305, 533, and 464 carloads of corn originated thereat.[1] Most of it was Commodity Credit Corporation corn [government controlled] which is usually shipped by rail for export, and is not subject to the same competitive forces as 'free' corn" (R. 13–14).[2]

The determinative factor in the selection of the mode of transportation prior to December 15, 1956, was the much lower local barge rate of approximately 4.625 cents[3] applicable from competing river ports to Chicago (R. 12) compared with the flat rate of 23 cents from stations on the Belt Line to Chicago. Although the reshipping rate on corn products from Chicago and Kankakee is the same, *i.e.*, 49.5 cents,

[1] Corn averages about 50 pounds to the bushel. A carload of corn based upon 100,000 pounds equals 2,000 bushels. The average number of bushels of corn moved during the years 1954, 1955, 1956 amounts to 868,000 bushels.

[2] As a direct result of the great disparity between the water and rail rates, country elevator operators located near or on the Belt Line watched the corn go past their doors down to the river. The status of the country elevator operators changed to buyers or merchandisers of corn for barge movement (R. 15, 16, 27). The lack of competitive rail rates tended to give the water carriers a monopoly on the movement of the considered traffic. This seriously affected the farmers since they were deprived of the benefits resulting from competitive bids. After the new rate became effective farmers received much more than they had received previously. For example, a farmer at the country elevator located at Blair, Illinois, received at least 8.75 cents a bushel more for his corn than he was able to obtain prior to the effective date of the challenged rate (R. 16, 19). (See also R. 463, 483, 490, 502–503, 504, 527, 676–677, 698).

[3] After the NYC had reduced its rates, the barge rate was increased in December, 1957, to 4.825 cents (R. 12).

the barge-rail combination produced a rate of 54.125 cents compared to the much higher combination all-rail rate of 72.5 cents. Hardly any corn traffic could be attracted to the Belt Line under such rate conditions, and the all-rail rate simply became a "paper" rate.

In an effort to meet the barge-rail competition,[4] effective December 15, 1956, the New York Central established a competitive proportional rate of 5 cents (now 6 cents because of general rate increases) minimum 100,000 pounds applicable on corn and corn products when milled in transit from Belt Line stations west of Kankakee to Kankakee for final destination at points east of the western termini of eastern trunk line carriers.[5] The proportional rate had no independent application but could only be used in conjunction with the existing reshipping rates beyond Kankakee as a factor in determining the ultimate through rates on corn products. The lawfulness of the new proportional factor was not challenged, and it became effective as scheduled.

Initially it was believed that any departures from the long-and-short haul provisions of section 4(1)

[4] The Commission points out (R. 11), "The proposed reduced rates are designed to recapture traffic represented as having been lost to competing barge lines operating by way of Chicago in conjunction with rail lines beyond. The carriers do not desire to reduce existing rates at higher-rated intermediate points not affected by the same competitive conditions."

[5] This would include points in New York, Pennsylvania, West Virginia, the New England States, Delaware, the District of Columbia, Maryland, New Jersey and Virginia.

of the Interstate Commerce Act, 49 U.S.C. §4(1), resulting from the application of the new proportional rate would be covered by existing Fourth Section Orders of the Commission. However, it was subsequently discovered that this was not the case and that additional authority was necessary. On June 27, 1957, the New York Central filed an application for fourth section relief with the Commission. The relief requested would permit the continuance or establishment and maintenance over existing all-rail routes, of reduced rail rates consisting of a combination of proportional rates from origins on the Belt Line west of Kankakee to points in the territory noted in footnote 4, *supra,* and to charge higher rates at intermediate points which are not subject to the same competitive forces. The application also was intended to cover a subsequent rate revision, effective August 29, 1957, designed to eliminate unauthorized destination departures (R. 12).

The relief authorized by the Commission is applicable only to the movements over direct routes by way of Kankakee from stations on the Belt Line west of Kankakee to destinations in the east. (See Fourth Section Order No. 19346, R. 29–30.) Chicago and points within the Chicago switching district are not on the direct routes covered by the Commission's fourth section order, and as such, are not embraced in the relief granted by the order. The proposed rates may be established over the circuitous routes via

Chicago without any prior approval or authority of the Commission.[6]

2. In accordance with the Commission's established initial rate procedure, the appellants filed protests against the fourth section application urging that the relief be denied (R. 172, 234, 251, 282). In addition, the appellants challenged the lawfulness of the proposed rate revisions effective August 29, 1957 under other sections of the Interstate Commerce Act such as sections 1 and 3 (R. 96, 126, 127, 133). They requested that the Commission invoke its discretionary investigation and suspension authority under secton 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7) which enables the Commission to enter into a general investigation into the lawfulness of challenged rates under all other applicable rate provisions of the Act.[7]

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[6] The second proviso of section 4(1) of the Act provides as follows:

> * * * *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: * * *

[7] The rates which had become effective on December 15, 1956 were no longer subject to the suspension provisions of section 15(7) of the Interstate Commerce Act. See *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658 (1963).

The New York Central filed a reply to the protests[8] (R. 252).

The limited matter of the fourth section application received initial consideration by a board of employees of the Commission known as the Fourth Section Board. The requests for a general investigation and suspension of the proposed rate revision were given initial consideration by another board of employees called the Board of Suspension.

The Board of Suspension, acting first on August 26, 1957, decided not to institute an investigation and not to suspend the proposed rate revision. The notice of the Board of Suspension specifically states *"This action does not constitute approval of the protested schedules. They may be made subject to investigation through formal complaint filed in accordance with the Commission's Rules of Practice"*[9] (R. 87). Upon the completion of its investigation the Fourth Section Board entered a fourth section order on August 27, 1957, granting the relief sought pending a hearing. The order of the Fourth Section Board also stated (R. 88) *"The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation*

[8] The Commission received two dozen letters and telegrams from grain and elevator companies and local banks on the Belt Line in support of the competitive all-rail rate revision.

[9] Such a complaint may be filed with the Commission at any time—even today—under the authority of section 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1).

and correction if in conflict with any provision of the Interstate Commerce Act." [10] [11]

The appellants filed petitions for reconsideration of the action of both Boards. On August 27, 1957, Division 2 of the Commission acting as an Appellate Division upheld the action of the Board of Suspension by voting not to suspend the protested rate revision, and a notice to that effect was issued on the same date (R. 90). The notice reminded the protestants that *"The action of the Board of Suspension and of Division 2 does not constitute approval of the protested schedules."* Additionally the determination not to suspend the proposed rate signified that the Commission had decided not to exercise its discretionary authority to enter upon a general rate investigation under section 15(7) of the Act. This placed the appellants on notice that any further challenge regarding the general lawfulness of the rates would have to be initiated by the appellants by filing a formal complaint under section 13(1) of the Act. Thus, the provisions of section 1.42 of the Commission's General Rules of Practice, 49 C.F.R. 1.42, specifically provides that "no protest shall include a prayer that

[10] This clause usually concludes a fourth section order to place interested persons on notice that the rates established and maintained under the authority may be challenged in an appropriate complaint proceeding before the Commission. See *Intermountain Rate Cases*, 234 U.S. 476, 493.

[11] The validity of the temporary fourth section order is not in issue here. Cf. *A. L. Mechling Barge Lines, Inc.* v. *U.S. and I.C.C.*, 368 U.S. 325 (1962). The fourth section order which is the subject of this appeal is based upon a full hearing and a report containing complete findings in accordance with the requirements of section 4.

it also be considered a formal complaint. Should a protestant desire to proceed further against a tariff * * * which is not suspended * * * a separate later formal complaint * * * should be filed."

The following day, August 28, 1957, the same Division of the Commission sustained the action of the Fourth Section Board. A notice of the Commission dated August 28, 1957, announcing action of Division 2 was issued and it also informed the protestants that "*The action of the Fourth Section Board of Division 2 does not constitute approval of the rates. They may be subject to an investigation through formal complaint in accordance with the Commission's Rules of Practice*" (R. 92).

Instead of filing a formal complaint with the Commission assailing the lawfulness of the reduced rates, the appellants elected to challenge the Commission's action in court. On November 29, 1957, a three-judge statutory district court issued its order dismissing the complaints for lack of jurisdiction.[12]

In the meantime, the Commission set the rail carriers' application for fourth section relief for hearing before an examiner. Hearing was held January 29, 1958, through February 4, 1958, in which appellants fully participated.

On March 11, 1959, the report of the examiner was issued (R. 32). Although the examiner recommended

[12] The case is entitled *A. L. Mechling Barge Lines, Inc., et al.* v. *United States and I.C.C., et al.*, C.A. No. 57 C 1450, U.S.D.C. N.D. Ill., E. Div.

that the application be denied,[13] he recognized the need for a rail rate adjustment to restore competition in this corn producing area, and that the adjustment would require fourth section relief.[14] With respect to Board of Trade's allegations of discrimination, the examiner held that "these issues [allegations] do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings"[15] (R. 49).

After the filing of exceptions and replies to the examiner's recommended report and order upon the request of several of the parties, Division 2 of the Commission heard the parties in oral argument on October 29, 1959. Thereafter, the report and order of June 8, 1960, the subject of this appeal, was issued by Division 2 which granted the application for

[13] The examiner recommended that the application be denied on the theory that the 6-cent proportional rate factor of the through rate, standing alone, was not reasonably compensatory.

[14] The examiner found that "It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail, and that such an adjustment requires fourth section relief." Significantly, even the appellants acknowledged that the prevailing all-rail rate had to be reduced before the Belt Line could participate in the traffic (R. 49–50). It should be noted that no fourth section relief would be required if the NYC chose to eliminate fourth section departures on the direct routes.

[15] In his report the examiner did not amplify his reasons given at the hearing for denying further cross-examination of the NYC witness on the subject of division of rail rates at Chicago. At the hearing the examiner's reason for his ruling was that the matter of divisions at Chicago was not "pertinent to the issues in this particular case" (R. 343).

fourth section relief (R. 9). The accompanying Fourth Section Order No. 19346 states in part: "The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act" (R. 29).

Petitions for reconsideration of the report and order of Division 2 were denied by the Commission on November 18, 1960 [10] (R. 31).

3. In granting the application for fourth section relief, the Commission specifically found "that applicants have shown a special case within the meaning of section 4 of the Act, by virtue of actual and compelling competition; that the proposed rates are not lower than necessary to meet that competition, do not constitute a destructive competitive practice, are reasonably compensatory, and will not impose an undue burden on other traffic" (R. 28–29). The finding, that the proposed rates were reasonably compensatory, was based upon the entire through rate from origins on the Belt Line to ultimate destinations in the east on the ground that the proportional "rate factor has no independent existence, but is an integral part of the rate which applies on the through transportation, from Belt origin, through the milling-in-

[10] In denying the appellants' petition for reconsideration, the Commission held that "the matters submitted in support thereof do not constitute substantial and material grounds to warrant reopening of this proceeding for reconsideration and reargument" (R. 31).

transit point, to delivery of the corn product at its ultimate destination" (R. 25).[17]

Of primary significance in this case is the fact that pending the proceedings before the Commission, it had the opportunity to observe the effect of the proportional rate effective December 15, 1956, upon the traffic of the competing barge line. Despite the restoration of effective competition, there was a substantial increase in the barge traffic to Chicago during the period December 15, 1956, to August 30, 1957, of about 90,000 tons over a corresponding period for the previous year. However, there was also a substantial increase in the amount of rail traffic originated on the Belt Line for a similar period.[18] After analyzing the corn movements in the Belt Line territory, the Commission was able to conclude that the new all-rail through rates attracted corn grown near the rail lines to the rails, whereas, corn grown in proximity to the river continued to be shipped by barge (R. 28).

The district court after careful review of the Commission's report concluded that the assailed order

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[17] In this connection, it must be noted that no fourth section departures occur on the inbound movement to a transit point such as Kankakee or Chicago. It is only when the reshipping rate is added to the inbound proportional rate to determine the through rate that the fourth section departures occur.

[18] For the period December 15, 1955–August 30, 1956, the barge shipments to Chicago amounted to 402,105 tons. They rose to 493,668 tons for the same period the following year. The 6-, 8-, and 12-month periods ending June 30, August 31, and December 31, 1957, show that Belt Line traffic progressively increased from 1,915 carloads of corn to 2,681 carloads (R. 14, 28).

fell within the statutory power of the Commission, that its findings and conclusions were supported by substantial evidence of record, and that no prejudicial error occurred in the hearings before the examiner and the Commission (R. 80).

The allegations of discrimination were discounted by the Commission when it pointed out that the proposed rates apply "from Belt points to eastern destinations via either Kankakee or Chicago," (R. 24) and that "since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official territory in their application" (R. 27). Moreover, the Commission found that "there is no indication of undue damage to Chicago" (R. 27). The district court held that "there is no indication of undue damage to Chicago" (R. 27). The district court held that the Commission is not required to go beyond the statutory requirements of section 4 to make ultimate findings that "a rate is lawful and not discriminatory" (R. 77). In this respect, the district court held that the allegations of discrimination should have been raised under the complaint provisions of section 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1), which is appropriate for that purpose (R. 77).

SUMMARY OF ARGUMENT

I

Section 4 of the Interstate Commerce Act is directed against a specific form of rate discrimination, *i.e.*, discrimination brought about by rail or water

carriers charging short-haul shippers more in the aggregate than the long-haul shippers for the transportation of like kind of property over the same route in the same direction, the shorter being included in the latter. However, section 4 also provides that the Commission may authorize a carrier to charge less for a longer than for a shorter distance limited to direct routes where the Commission finds that a special case exists and that the charges to or from the more distance point proposed to be established by the carrier are reasonably compensatory.

An order granting fourth section relief to the rail carrier applicants was issued by the Commission after a hearing. The order was limited to the direct all-rail routes from origins on the Belt Line to eastern destinations. The order also authorized the rail carriers to establish reduced through charges to the more distant points and to maintain higher through charges to intermediate points.

The fourth section order of the Commission is challenged because of alleged violations of sections 3(1) and 3(4) of the Act occurring at Chicago. Chicago is not on any of the direct all-rail routes embraced in the fourth section order. The rates which apply to the circuitous routes via Chicago are the result of independent action taken by the rail carriers which, since the 1957 amendment to section 4, does not require approval by the Commission. Since the fourth section order did not authorize much less require the establishment of a similar rate adjustment at Chicago, the Commission was not required to pass upon allegations of rate unlawfulness arising at a point not on

the direct routes, but on a circuitous route which is not embraced in the order of the Commission. The provisions of section 13(1) of the Act provide an appropriate and ample remedy for bringing to the Commission's attention collateral issues which are not involved in the fourth section proceeding before it.

II

The provisions of section 4 were designed primarily to prevent carriers from engaging in discriminatory practices which result in the long haul shippers obtaining an unreasonable rate advantage over competing short haul shippers. An order of the Commission authorizing an exception to the rule of section 4 permits the carrier to reduce through rates to the more distant points and to maintain higher through rates to the intermediate points. The attack upon the Commission's fourth section order disregards the through charges which it authorizes to be established and maintained. Instead the attack is concentrated upon a proportional factor to the transit point, a factor which has no independent application and which exists only as a part of the through charges as to which the Commission authorized departures from section 4. It is contended that this proportional factor which is neither the through charge to the more distant point, nor the charge to the intermediate points, a rate relationship to which the fourth section and the Commission's order are addressed, is not reasonably compensatory. In determining whether rates proposed to be established under the authority of a fourth section order are reasonably compensatory, the provisions of

section 4 on its face clearly require the Commission to base its determination on the through charge "to or from the more distant point". The proportional factor is not the through charge accordingly, the Commission is not required to determine in a fourth section proceeding whether the proportional factor, standing alone, violates other sections of the Act.

III

In a proceeding limited to the specific issues of section 4, namely, whether a special case exists, and whether the charge to or from the more distant point is reasonably compensatory the Commission is not required to enlarge the scope of its investigation to include issues under sections 3(1) and 3(4) of the Act which occur on routes other than the direct routes involved in the fourth section application. The limited provisions of section 4 were never intended to be used as a substitute for the broad general standards of section 3(1), which combined with the provisions of section 15(1), enable the Commission to deal with unlawful preferences and prejudices over all routes direct and circuitous which may be involved in a general rate investigation. In contrast the Commission in a section 4 proceeding is limited to a grant or denial or modification of the relief requested over the specific routes seeking fourth section relief. Allegations of rate unlawfulness occurring on routes other than the relief routes are not material to the issues before the Commission and for that reason need not be passed upon by the Commission, even where evidence as to such allegations is admitted into the record.

Whether the Commission should enlarge the scope of a section 4 proceeding beyond the limits of section 4 into a general rate investigation is committed by law to the discretion of the Commission. Where the evidence of undue preference and prejudice relating to the application of a milling in transit limitation consists merely of rate comparisons and nothing more to show a violation of section 3(1), the Commission cannot be said to have abused its discretion when it did not convert the limited section 4 proceeding into a general rate investigation.

IV

The Commission's determination that the proposed rates are not lower than necessary to meet the competition and do not constitute a destructive competitive practice was based upon findings showing that the through charges are reasonably compensatory. These findings were made in accordance with the long standing criteria of a reasonably compensatory rate set forth in *Transcontinental Cases of 1922*, 74 I.C.C. 48. As to these findings the district court found that there was substantial supporting evidence of record. No one challenged the compensativeness of the through rates. The provisions of the National Transportation Policy relating to destructive competitive practices do not impose any more or different standards for determining whether a rate constitutes a destructive competitive practice than the long established test followed by the Commission for almost half a century *which are spelled out in Transcontinental Cases of 1922, supra.* Finally where a competing barge line

can meet the reduced all-rail rate applicable to direct routes and still recover its fully distributive costs no destructive competitive practice is shown.

ARGUMENT

I

In determining whether a carrier should be permitted to charge a long-haul shipper less than a short-haul shipper for like transportation service over direct routes, the Commission is not required to consider and pass upon alleged violations of other rate sections of the Interstate Commerce Act which do not occur on the direct routes embraced in the fourth section application

The provisions of section 4(i) of the Interstate Commerce Act are directed against a specific form of rate discrimination by common carriers by rail and water. Thus, section 4 of the Act forbids such carriers from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property for a shorter distance than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance. This is not an absolute and inflexible prohibition which is intended to prevent carriers in appropriate competitive situations from establishing rates which result in higher charges to the shorter haul shippers in contravention of the prohibition set forth in section 4.[19] Congress has qualified the prohibition of section 4 by providing, "that upon application

[19] See Report of the Senate Select Committee on Interstate Commerce (Cullum Report), 49 Cong. 1st Sess. 1886, Vol. 1, pp. 195–198; and *In Re Louisville & Nashville R.R. Co.*, 1 I.C.C. 31, 78 (1887).

to the Commission after investigation, such carrier, in special cases may be authorized to charge less for longer than for shorter distances for the transportation of property * * * but in exercising the authority conferred upon it in this provision the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory."

A. Where the Commission authorized relief from the long-haul short-haul provisions over direct routes, it was not required to determine whether the carrier publication of the same rates applicable to circuitous routes violated section 3 (1) and (4)

Prior to July 11, 1957 carriers desiring to charge shippers higher rates at the intermediate points than at the terminal points over any routes, direct or circuitous were required to obtain long and short haul relief from the Commission. On July 11, 1957, the provisions of section 4(1) were amended. The amendment limited the application of section 4, and the Commission's power thereunder over fourth section departures only to the direct routes. At the same time, the amendment authorized carriers operating over circuitous routes to meet the charges made over the direct routes without requiring any approval by the Commission.[20] With the enactment of the 1957 amendment, the Commission confined its consideration of fourth section applications to relief over the direct routes. *Iron & Steel to Southwest Gulf Ports,* 301 I.C.C. 669, 670 (1057); *Sulphuric Acid From Nitro, W. Va. to Jeffersonville, Ind.,* 302 I.C.C. 143, 147 (1957).

[20] The provisions of the 1957 amendment to section 4 are set forth in ftn. 5, *supra.*

Although the application of section 4 was limited solely to the direct routes by the 1957 amendment, shippers at the intermediate points on the circuitous routes were not left without a remedy. It was contemplated that aggrieved shippers at the intermediate points on circuitous routes could file a complaint with the Commission pursuant to section 13(1) of the Act against the rate action taken by the carriers.[21]

Thus, shippers are able to challenge the lawfulness of reduced rates over competitive circuitous routes to the same extent and in the same manner that they are able to dispute the lawfulness of any other carrier-made rates. That this is the intent of Congress is borne out by the legislative history of the 1957 amendment. Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 577, 85th Cong. 1st Sess., pp. 2–3 (1957).

In the instant case, neither Chicago nor the Chicago Switching District are on any of the direct routes involved in the fourth section proceeding before the Commission. This is graphically illustrated by exhibit 2 to the NYC application for fourth section relief (R. 140) which consists of a map depicting in red the direct all-rail routes from stations on the Belt Line to the east as going via Kankakee. The Commission at the outset of its report (R. 10) indicates that it is limiting its considerations to relief over the direct all-rail routes for transportation of

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[21] The amendment simply reinstated fourth section regulation as it existed prior to the Mann-Elkins Act of 1910. *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U.S. 144.

corn products from origins on the Belt Line to eastern destinations. Indeed, the proof offered by the applicant railroads at the hearing in support of their application was directed only to the need for relief over the direct routes. Additionally, Fourth Section Order No. 19346 (R. 29–30) in which the Commission granted the fourth section relief challenged by the appellants, specifically covers only the direct all-rail routes.

While the proposed reduced rates were made applicable via Chicago giving the Chicago shipper of corn products the same benefits accruing to the Kankakee shipper of corn products, it is abundantly clear that the reduced rate over the circuitous route through Chicago was established by the voluntary act of the rail carriers which required no fourth section relief or approval by the Commission. Thus, any alleged grievances which the appellants may have at Chicago do not result from the fourth section order of the Commission challenged here for the order does not cover the routes through Chicago.

In view of the fact that the grant of fourth section relief applicable to direct routes via Kankakee did not even authorize, much less require the establishment of a similar adjustment at Chicago, there is no basis for an allegation that the fourth section order created a section 3(4) or any other violations of the Act at Chicago. Since the rate to movements via Chicago does not result from the action of the Commission granting the fourth section relief over Kankakee, but from the voluntary act of the carriers publishing the same rate to apply via Chicago, the

remedy of the appellants is not in the Fourth Section proceeding, but by the initiation of a complaint under section 13 of the Act alleging violations of appropriate sections of the Interstate Commerce Act. *United States* v. *Merchants & M. Traffic Ass'ns.*, 242 U.S. 177.

It is clear from what has been said above that as between Chicago and Kankakee, no unlawful preference and prejudice relationship has been created by the action of the Commision granting fourth section relief over the all-rail direct routes via Kankakee. Moreover, any benefits enjoyed by the shippers of corn products through Kankakee accrue also to the shippers of corn products through Chicago.

In fact the shippers at Chicago are enjoying greater benefits as a result of the reduced rate than the shipper of corn off the Belt Line through Kankakee. Unlike the Kankakee shippers, the Chicago shippers also have available to them the much lower barge-rail rate applicable to Chicago which is not subject to the milling-in-transit limitation. The disability of a grain dealer of whole corn at Chicago who is allegedly unable to quote a definite price because he does not know where or whether the corn will be processed prior to final delivery is an infirmity of his business practices which cannot be attributed to the right of a carrier to initiate rates for the transportation service it provides. The Commission was correct in finding (R. 27):

> * * * However, since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official territory in their application. Moreover, the routes over Kankakee are the same as they

were for many years prior to the establishment of the proposed rates, and, while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago.

B. In a section 4 proceeding which is limited to determining whether a carrier should be authorized to establish reduced through charges to the more distant point, and to maintain higher through charges to intermediate points the Commission is not required to determine whether a proportional rate factor, which has no independent application, but is used only in determining the through charge, violates other sections of the Act

The appellants take the view that the Commission's action in this case granting fourth section relief which enabled the rail carriers to establish reduced rates over the direct routes via Kankakee to the more distant points and to maintain higher rates to the intermediate points constitutes an unsound departure from the Commission's policy of denying fourth section relief where the rates established under the Commission's order violate other sections of the Act, especially section 3(1). Furthermore, they assert that the Commission erred when it did not finally rule upon the evidence submitted into the record to support their allegations of unlawfulness under sections of the Act other than section 4. This bare allegation is made without any consideration of the issues which confront the Commission in a section 4 proceeding. It simply overlooks the specific limitations of the statute such as discussed in subpoint A above, and the type of order entered by the Commission. Of course, the Commission does not grant relief from the prohibition of the fourth section where the rates proposed to be established and maintained under such an order, results in violations of other sections of the Act. But,

certainly this does not mean that every allegation of rate unlawfulness, no matter how remote, is to be disposed of in a fourth section proceeding.

The fourth section order of the Commission authorizes a variance in rates between the long-haul shipper and the short-haul shipper, *i.e.*, it authorizes reduced *through* rates on the long-haul movement compared to the higher *through* rates to intermediate points. Shippers adversely affected by such *through* rates may intervene and be heard in the fourth section proceeding.

But, in this case, the attack is directed not against the rates to the more distant or to the intermediate points authorized to be maintained by the fourth section order; instead, the attack is directed at a proportional factor to the transit point—with no independent application—which proportional factor exists only as a part of the through charges as to which the Commission authorized departures from section 4. The proportional factor is not the *through* charge to the more distant point, nor is it the charge to the intermediate points, a rate relationship to which the fourth section order is primarily directed. Accordingly, the Commission was not required to pass upon allegations of unlawfulness which did not result from the *through* charges authorized and applicable at either the more distant or the intermediate points. For this reason the Commission was not required to extend its considerations beyond the issues immediately before it which were raised by the fourth section application.

However, Mechling and the Board of Trade did not attack the *through* charges before the Commission.

Instead, they concentrated upon the proportional rate factor which has no independent application. Practically all of the evidence submitted by the protestants before the Commission was directed against the level at which the rail applicants chose to peg their competitively compelled all-rail rates. (*E.g.*, statement of position by Board of Trade's witness Chartrand, R. 795.) In order to show that the reduced rate was not reasonaby compensatory appellants Board of Trade and Mechling concentrated their attack upon the 6-cent proportional rate factor on the theory that the 6-cent proportional rate factor was a separate component of a through rate. The Board of Trade and Mechling did not challenge the compensativeness of the through charges.

The Commission rejected the theory of the Board of Trade and Mechling holding (R. 25) "that [the] rate factor has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origins, through the milling in transit point, to delivery of the corn products at its ultimate destination." The 6-cent proportional rate factor has no independent application to shipments from stations on the Belt Line to the transit points. No fourth section departures occur at points between the Belt Line origins and the transit points; such as Kankakee. It is only after reshipment from such a transit point where the proportional rate factor is used to determine the through charge that fourth section departures occur.

The provisions of section 4 are intended to prevent carriers from engaging in discriminatory practices in

which the long-haul shipper obtains a rate advantage over competing short-haul shippers. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 638. Section 4 speaks in terms of "compensation in the aggregate" and "the establishment of any charge to or from the more distant point." The 6-cent proportional rate is neither the compensation in the aggregate for the longer distance, nor is it the charge to or from the more distant point. The Court below held that the Commission's treatment of the reasonably compensatory issue was correct (R. 78). Although appellants in No. 58 renew their attack upon the 6-cent proportional, the United States concedes with the qualifications which we discuss hereafter, that the Commission's position is correct stating (Br. of U.S., p. 32):

> * * * In other words, we agree that the legislative history of the statute,* as well as its plain terms, support a construction which prohibits the granting of Section 4 relief only if the total rate for a *longer* haul is not compensatory. Since the figures which are to be compared in this case are the rate for the short haul from Kankakee to the eastern destination and the rate for the long haul from the Belt origin to that destination, the Commission properly rejected the protestants' contention that Section 4 relief was prohibited because the proportional rate from the Belt origin to Kankakee (only part of the long haul) was non-compensatory. (*Footnote omitted.)

We submit that the interpretation of the reasonably compensatory provision sought by Mechling at this

time is illogical and does not comport with the plain terms of section 4.

C. Upon the record made in this case there is no showing that the Commission abused its discretion when it did not convert the proceeding before it which was limited to the specific issues of section 4 into a general rate investigation

Shippers who are not on the routes embraced in a fourth section order, or who cannot show that they are adversely affected by the through rates applicable for the long and short haul shippers authorized by the fourth section order, do not require the protection of section 4, for their interests are safeguarded by other appropriate sections of the Act such as section 1 dealing with the reasonableness of rates; the discrimination provisions of section 2; and the provisions of section 3(1) relating to undue and unreasonable prejudice and disadvantage between shippers, all of which can be raised by complaint under section 13(1). Significantly, the provisions of section 3(1) do not apply to the traffic of another carrier; thus, "this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." This is so because a carrier's interest is directed at the level of the rates published by its competitor, and whether the published rates are lower than necessary to meet existing fair competition. *Seatrain Lines, Inc.* v. *United States,* 168 F. Supp. 819 (S.D.N.Y., 1958); cf. *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.,* 372 U.S. 744, 759 (1963). We submit that the limited and specific provisions of section 4 designed primarily for the

protection of intermediate shippers on the relief routes, were never intended to be used as a substitute for the broad and general standards of section 3(1).

Section 4 of the Act is simply a specification of a more general standard. This was initially recognized by the Commission in the *Railroad Commission of Nevada* v. *Southern R. Co.*, 21 I.C.C. 329 (1911), when it stated (p. 338):

> * * * The test which the Commission must now apply to determine whether the carrier may be given the advantage of an exception to the general rule of section four is the same test that it may apply with respect to any other discrimination or inequality. There is incorporated in section four every standard set up by Congress as a *guide* to this Commission which is to be found in any section of the act. (Emphasis supplied.)

This does not mean that section 4 contains the same comprehensive provisions as section 3 which enables the Commission to deal with unlawful preference and prejudice between shippers on a broad scale. *New York* v. *United States*, 331 U.S. 284; *Ayrshire Collieries Corp* v. *United States*, 335 U.S. 573; *New York Central Railroad Co.* v. *United States*, 207 F. Supp. 483 (S.D.N.Y., 1962). Section 4 is no more a substitute for the broad provisions of section 3(1) than are the limited exacting discrimination provisions of section 2 for section 3(1). *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 197, 219; *Barringer & Co.* v. *United States*, 319 U.S. 1, 13. Significantly, under section 3(1) and 15(1) the Commission is empowered to prescribe the precise

rate or the maximum and/or minimum necessary to remove the undue prejudice. Such an order runs against all of the carriers that effectively participate in both the prejudiced and the preferred rates over all of the routes involved in the proceeding. In contrast, in a section 4 proceeding the Commission's power is limited to a grant or denial or modification of the relief prayed over the specific routes seeking fourth section relief.

In determining the limited issues presented by a section 4 application dealing with the rate relationship between the long and short haul shipper over direct routes, the standards of section 3(1) are to be employed as a *guide* in resolving whether an exception to the long and short haul prohibition should be sanctioned. Section 3(1) was not intended to replace section 4, but this conclusion follows if the appellants' views are adopted. Under appellants' views, every fourth section application proceeding could be converted into a general rate investigation,[22] but this is

[22] The United States apparently believes this should occur only if found to be practicable by the Commission (U.S. Br., pp. 23, 25–26). There was no reason for the Commission to determine whether it would be practicable to enlarge the scope of the section 4 proceeding to include issues not bearing on the questions of whether a special case existed and whether the rates proposed are reasonably compensatory because, after considering the protests which assailed the general lawfulness of the rates, the Commission declined on its own motion to institute such an investigation, and the matter was set down for hearing limited to the issues of section 4 (R. 11). There was no occasion to consolidate the general rate issues raised by the appellants Board of Trade and Mechling because they never did file a formal complaint under section 13 with the Commission.

precisely what the Commission did not intend to do in August, 1957 when it declined on its own motion to exercise its discretion under section 15(7) to institute an investigation and suspension proceeding. Cf. *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658. Clearly the Commission's refusal to institute a general rate investigation on its own motion is discretionary and may not be compelled. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309.

However, the appellants contend that since evidence relating to section 3(1) violations brought about by the milling in transit limitation had been placed in the record, the Commission was required to rule on such evidence before disposing of the section 4 application. This argument assumes (1) that the evidence adduced by the Board of Trade is relevant and material to the section 4 issues before the Commission, and (2) that the evidence was sufficient to warrant final disposition by the Commission.

The provisions of section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b), only require the Commission to make findings upon *material* issues of fact, law or discretion presented on the record. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167–168 (1962). Section 4 specifies the test which the Commission must apply before it can authorize a carrier to charge less for a long haul than for a short haul over direct routes. The Commission must determine (1) whether a special case exists and (2) whether the charge to or from the more distant point is reasonably compensatory. Evidence relating only to these

limited questions is material to the sole issue posed by section 4, *i.e.*, whether the applicant should be excepted from the long and short haul prohibition. *Seatrain Lines* v. *United States*, 168 F. Supp. 819, 824–826; *United States* v. *Merchants & Manufacturers' Assn.*, 242 U.S. 178; cf. *Koppers Company* v. *United States*, 132 F. Supp. 159 (D.C. Pa., 1955). No other conditions are prescribed by section 4(1) which the Commission must consider before authorizing relief from the long and short haul provision.[23] The order of the Commission is permissive only; "it does not name or prescribe the rates and it appears that the intent of its effect is that a proper showing has been made for the allowance of an exception to the long and short haul clause and to permit the exception to operate." *City of Danville* v. *Chesapeake & O.R. Co.*, 34 F. Supp. 620, 632–633. In fact the order of the Commission specifically disclaims any approval of the rates filed under the authority (R. 30); and the proceeding before the Commission is confined solely to the issue of section 4. Evidence relating to unjust discrimination offered by shippers which are not on the direct routes embraced in the fourth section application and by competing carriers is not material to the issue before the Commission. Therefore, the Commission is not required to pass upon such evidence, especially where the provisions of section 13(1) of the Interstate Com-

[23] Section 4 also requires that the water competition actually exist before relief is granted. There is no doubt of the existence of severe water carrier competition in this case.

merce Act afford a complete right to redress." *United States* v. *Merchants & M. Traffic Assn., supra.*"

The United States and the Board of Trade assert that there has been full development of the evidence relating to the allegation that the milling in transit limitation violated section 3(1). To support this assertion, they point to the testimony of Witness Chartrand (R. 794–827). Except for his statement (R. 795) that the Board of Trade opposed the milling in transit limitation and the submission of two exhibits comparing rates on corn and corn products (R. 815, 816), which simply showed a difference in rates between the two commodities, nothing more was submitted in support of the allegation that the milling in transit limitation results in a violation of section 3(1).

The principles applicable to the determination of whether a rate on a particular commodity creates an "undue preference or prejudice" are well established. Not all preference an prejudice is prohibited by section 3(1); only those which are "undue" or "unreasonable". *United States* v. *Wabash R. Co.*, 321 U.S. 403, 411 (1944); *United States* v. *Illinois Central R.*

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[24] This Court held in *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332, "the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure [citations omitted]." See also *League* v. *Texas*, 184 U.S. 156, 158.

[25] It is submitted that the appellants in their attempt to avert the impact of the *Merchants* case upon section 4 proceedings by limiting it to merely an issue of proper exhaustion of administrative remedies, over simplifies the comprehensive discussion by Mr. Justice Brandeis.

R., 263 U.S. 515, 521 (1924); *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U.S. 197, 219–220 (1896). In the latter case this Court held (p. 219): *"The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act."*

Whether a given rate results in an undue preference or prejudice is essentially a question of fact to be determined by the Commission. *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942); *New York* v. *United States*, 331 U.S. 284, 347 (1947); the Supreme Court in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 304, said: "* * * Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon application of all the facts and circumstances affecting the traffic." "How much weight shall be given to each must necessarily be left to it [the Commission]." *United States* v. *Illinois Central R. R., supra*, p. 524.

In order to establish undue preference and prejudice, it must be shown among other things that different rates are charged for substantially similar services under similar transportation conditions; and that this disparity has injured the party prejudiced and benefited the party preferred. *United States* v. *Wabash R. Co.*, 321 U.S. 403; *Texas & Pacific Ry.* v. *United States*, 162 U.S. 197; *United States* v. *Illinois Central R.R.*, 263 U.S. 515. Undue prejudice cannot be predicated upon a mere existence of a difference in

rates and some evidence of competition. "Differences in conditions may justify differences in carrier rates or services" *United States* v. *Wabash R. Co.*, 321 U.S. 403, 411. The mere fact that the application of competitive all-rail through rates result in a higher rate on whole corn is not, without more, sufficient to show a violation of section 3(1). *Interstate Commerce Commission* v. *Chicago Great Western Railway Company*, 209 U.S. 109 (1908).[20]

Although a NYC witness said that similar competitive conditions apply to whole corn and corn milled in transit (R. 367), this is not enough to overcome the deficiencies in the Board of Trade's case. Moreover, as we have noted, *supra*, this limitation applies equally to the Kankakee shipper of whole corn as well as to the Chicago shipper.

While the NYC stated that it intended to remove the milling in transit limitation, this is strictly a matter within its managerial discretion. *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744, 759. There is no requirement that it must be removed, at least not until it has been demonstrated by

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[20] Chamber of Commerce, *Houston* v. *S. P. Co.*, 49 I.C.C. 316, 318–319, peanut oil over peanuts; *Dahlstrom Metallic Door Co.* v. *E. R. R. Co.*, 155 I.C.C. 402, 406–407, sheet metal work over sheet metal; *Pacific Coast Steel Co.* v. *Director General*, 62 I.C.C. 207, ingots over manufactured iron and steel articles; *Crown Willamette Paper Co.* v. *D.G.*, 78 I.C.C. 273, 277 and *Minnesota & Ontario Paper Co.* v. *D.G.*, 93 I.C.C. 105, 108, wood pulp over paper. In the latter case the Commission held, "* * * although we have condemned rates on raw materials higher than on the products manufactured therefrom, it does not necessarily follow from a showing that rates on wood pulp are higher than those on certain kinds of paper that the former rates are unreasonable in and of themselves."

relevant facts in an appropriate proceeding before the Commission that the milling in transit limitation causes "undue or unreasonable preference or advantage" and "undue or unreasonable prejudice or disadvantage." *United States* v. *Wabash R. Co.*, 321 U.S. 403.[27] Although the Commission refers to the NYC intention to remove the milling in transit limitation (R. 27), it is apparent that the Commission did not consider the matter material to the issue before it since it merely stated that (R. 27), "these issues do not directly deal with the fourth section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings."

While the Commission did not rule upon the Board of Trade's contentions of section 3(1) violations, the Commission did not ignore the evidence or the contentions because it found that (R. 27) "there is no indication of undue damage to Chicago." In view of lack of evidence to support the Board of Trade's contentions, no other finding is warranted."[28]

In view of what we have said above it is clear that the Commission is not required to convert a proceed-

[27] The record indicates that the milling in transit limitation would be eliminated after final disposition of the present fourth section application proceeding (R. 389, 562).

[28] Cf. *Grain and Grain Products Within The Western District*, 284 I.C.C. 723, (1952). The Board of Trade alleged that the failure to grant transit at Chicago constituted an unreasonable practice and undue preference and prejudice in violation of section 3(1) and section 4. The Commission held (p. 731): "The granting of transit at one point and not on another on the same route, * * * does not contravene section 4. * * * The present record affords no proper basis for determination of the issues presented under sections 1 and 3."

ing limited to the issues of section 4 into a full scale rate investigation even though some evidence on irrelevant issues has been admitted into the record. This applies equally to the allegations of section 3(4) violations by Mechling which as shown *supra* do not result from the fourth section order entered by the Commission. *Transamerican Freight Lines* v. *United States*, 51 F. Supp. 405, 412 (D. of Del. 1943); *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561–562 (1958); *Scott Truck Lines, Inc.* v. *United States*, 163 F. Supp. 118; cf. *Eastern Air Lines* v. *C.A.B.*, 243 F. 2d 607. Whether the Commission should enlarge the scope of a section 4 proceeding beyond the requirements of the statute is committed by law to the discretion of the Commission. See section 17(3) of the Interstate Commerce Act, 49 U.S.C. section 17(3);[29] *Brotherhood of Maintenance of Way Employees, et al.* v. *United States and Interstate Commerce Commission*, 221 F. Supp. 19 (D.C.E.D. Mich., 1963), aff'd per curiam Nos. 510 and 511 this term, Dec. 9, 1964; *United States* v. *Northern Pacific Ry.*, 288 U.S. 490, 501–502 (1953); *Railway Express Agency* v. *United States*, 205 F. Supp. 831, 835 (S.D.N.Y., 1962); *American Trucking Association* v. *United States*, 326 U.S. 77, 83 (1945); *Federal Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 523 (1946). An analysis of the evidence submitted by the Board of

[29] The pertinent provisions of section 17(3) are as follows:

The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

Trade shows that the Commission properly exercised its discretion. The Commission has made the appropriate findings relevant to the fourth section issue before it and as the district court found, those findings are (R. 80) "based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission." "This is all the statute requires." *Community & Johnson Corp.* v. *United States,* 156 F. Supp. 440, 443 (S.D.N.J. 1957); *Capital Transit Co.* v. *United States,* 97 F. Supp. 614, 621 (D.C.D.C., 1951).

II

Based upon substantial evidence of record, the Commission properly found on the basis of the through rates that the proposed rates are not lower than necessary to meet the barge-rail competition, and that the proposed rates do not constitute a destructive competitive practice

Before the Commission can permit the exception to the long and short haul provision to operate, it is required to find (1) that a special case exists and (2) that the charge to or from the more distant point is reasonably compensatory. As to the first statutory finding, the record leaves no doubt that the almost complete elimination of the rail carrier from participation in the transportation of corn traffic from points on the Belt Line to the east resulting from the far lower barge-rail rate required a reduction in the all-rail rate from Belt Line points. The United States in its memorandum in response to this Court's request for comments upon the

Jurisdictional Statements filed by the appellants stated (p. 17, ftn.):

> Appellants in No. 746 also raise an additional issue as to whether there is substantial evidence to support the finding that a "special case" exists authorizing the proposed rates in question. We do not believe that any real issue is presented as to whether "compelling competition" warranting the finding of a special case exists. The record shows clearly that virtually all rail traffic from points on the Belt Line to Chicago and Kankakee had been diverted from the railroads to the barges.

The more recent brief of the United States does not appear to alter this statement. Significantly, the record shows that no one disputed the existence of a special case by virtue of compelling competition brought about by the much lower barge-rail rates."

After conceding that the Commission properly determined that the entire through rate is reasonably compensatory, the United States abruptly faces about and contends that the proportional rate factor from Belt origin to Kankakee amounts to a destructive competitive practice citing for its authority the National Transportation Policy, 49 U.S.C. preceding section 1 and this court's recent opinion in *Interstate*

" On the issue of whether a "special case" existed, the district court found (R. 78–79):

> * * * The record is replete with exhibits and testimony which show that prior to the changed rate almost all free corn, as distinguished from government corn, grown in the geographical area involved was shipped via barge to Chicago and thence by rail to its eastern termini. This obvious disparity of corn shipment was found to exist by the Hearing Examiner and the Commission. 310 I.C.C. 438–441. * * *

Commerce Commission v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744 (1963). The logic of this contention escapes us for it completely ignores the Commission's long established test used in determining the measure of a reasonably compensatory rate within the meaning of section 4.

In *Transcontinental Cases of 1922*, 74 I.C.C. 48, the Commission defined a reasonably compensatory rate in the following terms (p. 71):

> * * * We are of the opinion and find that in the administration of the fourth section the words "reasonably compensatory" imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) *be no lower than necessary to meet existing competition;* (3) *not be so low as to threaten the extinction of legitimate competition by water carriers;* and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in section 15(a) of the act. (Emphasis supplied.)

The National Transportation Policy, insofar as it condemns unfair or destructive competitive practices, merely restates in general terms the more specific standards which the Commission for almost half a century has applied in section 4 proceedings involving rail-water competition.

After exhaustively treating the evidence of record dealing with comparative earnings, rate levels and operating conditions adduced in support of the pro-

posed adjustment (R. 22–25); and upon consideration of the evidence of the actual movement of the traffic during the nine-month period after the rate adjustment became effective in December, 1956, the Commission found that (R. 29) "the proposed rates are not lower than necessary to meet the competition, [and] do not constitute a destructive competitive practice."

The United States urges that the Commission's finding is not supported by any evidence or economic analysis (Br. U.S., p. 34). The district court which had available the complete record made before the Commission as well as the contentions of the parties below apparently had no difficulty in ascertaining and concluding that the Commission's findings were supported by substantial evidence. The district court after referring to the tests set forth in the *Transcontinental Cases of 1922* as being judicially approved held (R. 79–80):

> * * * In the instant case comparative earnings, rate levels and operating costs were submitted to support the compensativeness of the proposed rate. 310 I.C.C. 437, 448–449. This was a proper formula to support the Commission's finding. *Fed. Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942); *United States* v. *Northern Pacific Ry. Co.*, 288 U.S. 490, 500 (1933); *Youngstown Sheet & Tube Co.* v. *United States*, 295 U.S. 476, 480 (1935); *City of Harrisonburg* v. *Chesapeake & O. Ry. Co.*, 34 F. Supp. 640, 644–645 (D. C. Va., 1940); *Tidewater Associated Oil Co.* v. *A.T. & S.F. Ry. Co.*, 278 I.C.C. 586, 589; *Summer Co.* v. *Erie R. Co.*, 262 I.C.C. 43, 46. In finding that

> the rate was no lower than necessary, the Commission also examined the bid prices of the two modes of transportation and the effect they had on those country elevators located between the Illinois River and the Belt. In finding that the rate was not destructive of competition nor unduly burdensome, the Commission had before it evidence of the amount of corn shipped via the two modes of transportation in the periods here in question.

Thereafter the district court found (R. 80):

> There is no challenge of the detailed facts underlying the findings or conclusions and we find that there is the requisite substantial basis for the findings and conclusions. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 140.
>
> We conclude that the order in question was within the statutory power of the Commission, that it is supported by findings and conclusions based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission. For these reasons we think the complaint should be dismissed. The order of dismissal is being entered this day.

We submit that the district court's conclusions are correct, especially when consideration is given to the fact that no one has assailed the through rate as not being reasonably compensatory. Moreover, the United States having admitted that the Commission had properly rejected the contention that the 6-cent proportional rate factor should have been used as the basis for determining whether the through rate was reasonably compensatory, cannot now be heard to

allege that the Commission erred in failing to determine whether the same proportional rate factor, standing alone, constituted a destructive competitive practice within the meaning of the National Transportation Policy. We submit that the tests set forth in the *Transcontinental Cases of 1922, supra*, are reflected in the National Transportation Policy, and that the latter does not create any additional standards than those which the Commission has applied for many years in section 4 proceedings.

Implicit in the position taken by the United States is the presumption that the NYC had deliberately schemed to publish a reduced rate knowing that it would lose money on each movement from origins on the Belt Line via Kankakee for the sole purpose of driving the barge lines out of business. Perhaps the hypothetical situation described by the United States (Br. U.S., p. 33) could lead to destructive competitive practices, but the facts in this case offer no support at all to such a conclusion.

In *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744, this Court stated (p. 759):

> * * * If there is one fact that stands out in bold relief in the legislative history of § 15a(3), it is that Congress did not regard the setting of a rate at a particular level as constituting an unfair or destructive competitive practice *simply* because that rate would divert some or all of the traffic from a competing mode. Moreover, neither the Commission representative nor the witness who testified on behalf of the appellant carriers (supra, pp. 754–756) took this po-

sition, since they too recognized that such an interpretation would be inconsistent with the mandate of the National Transportation Policy to "preserve the inherent advantages of *each*" mode of transportation. If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service. Nor should the selective character of such a rate reduction, made in response to a particular competitive situation, be permitted, without more, to furnish a basis for rejecting the rate. Section 15a(3), in other words, made it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. *The principal purpose of the reference to the National Transportation Policy, as we have seen, was to prevent a carrier from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, by setting a rate, below its own fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic.* (Emphasis supplied.)

In this case the Commission found that Mechling's fully distributed costs for the transportation of corn from the six most competitive ports to Chicago was 4.4 cents per hundred pounds (R. 26, see also R. 632 and Mechling Br., p. 12). The average barge rate on the Illinois River prior to December, 1957 was 4.625

cents per hundred pounds which is .225 cents above the fully distributed costs. In December, 1957, about a year after the NYC reduced rate became effective, and after experiencing about 12 months of competition, Mechling in December 1957 increased its rates by .2 cents per hundred pounds, thus further increasing its spread over its maximum fully distributed costs. This is indeed a most unusual way in which to meet a reduced rate alleged to be a destructive competitive practice under any theory of law or economics. Moreover, despite the restoration of effective competition, there was a substantial increase in the barge traffic to Chicago during the critical period December 15, 1956 to August 30, 1957 of about 90,000 tons over a corresponding period for the previous year. There was an increase in the amount of rail traffic originated on the Belt Line for a similar period.[21] This is precisely what the reduced rate was supposed to do. *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co., supra,* p. 759; *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 568 (1919).

After analysis of the corn movement in the Belt Line territory during the critical period when the reduced all-rail rate was in effect, the Commission concluded (R. 28): "It is apparent that while corn grown adjacent to the Belt was attracted to the rails, that grown adja-

[21] For the period December 15, 1955–August 30, 1956, the barge shipments to Chicago amounted to 402,105 tons. It rose to 493,668 tons for the same period the following year. The 6-, 8-, and 12-month periods ending June 30, August 31, and December 31, 1957, show that Belt Line traffic progressively increased from 1,915 carloads of corn to 2,681 carloads (R. 13–14, 28).

cent to the river remained with the barges. Thus, it is evident that the proposed rates are not lower than necessary to meet the barge competition." We submit that a reduced rate with the following characteristics (1) enables a competing carrier to participate in the transportation of a specific type of traffic; (2) permits the barge-line to maintain rates above maximum fully distributed costs and even to increase its rates; (3) which does not result in a loss of the level of traffic to the barge lines, (4) which destroys a monopoly and fosters competition to the benefit of farmers and shippers in an area where competition no longer existed, cannot be labeled as a destructive competitive practice or "competition that kills"; *Skinner & Eddy Corp.* v. *United States, supra* at p. 568. It is apparent that Mechling can meet the all-rail rate and still recover its fully distributed costs.

Another reason given by the United States in support of its allegation that the proportional rate factor appears to be predatory and in contravention of the National Transportation Policy is its assertion that the 5½-cent proportional rate factor had not been shown to be remunerative.[12] Apparently the United

[12] The United States implies (U.S. Br., p. 31) that the Commission had adopted the examiner's finding that the proposed 5½-cent proportional rate was somewhat lower than the adjusted out of pocket costs of the railroad. The Commission specifically did not adopt this finding of the examiner because the study upon which figures were based was limited solely to the inbound rate and failed to take into consideration that it could only be used in determining the through all-rail rate (R. 25). Consequently, there is no basis for the conclusion of the United States that it is beyond dispute that the Belt Line portion of any through transportation under the new rate is not remunerative.

States takes this position on the unwarranted and unsupported theory that the NYC transports corn from Chicago to Kankakee, destined to the east, either free or at a loss. Therefore, the United States concludes that any savings gained by the NYC through the use of the more direct route to the east from Belt origins via Kankakee rather than the more costly route from Chicago to Kankakee is not added revenue but merely a reduction in the NYC's losses.

This allegation like the prior one is without merit because it fails to take into consideration the entire through transportation over which costs and revenue should be spread.[35] The United States apparently believes that a cost study by the rail carrier is a *sine qua non* before a reduced rate may be shown reasonably compensatory. In answer to a question as to the failure of the rail carriers to submit a cost study, the NYC witness stated (R. 320):

> Well, it was self evident to me that this 5½ cent rate plus what I saved on the absorption charge at Chicago netted me 7½ cents more than if I handled this traffic from Chicago, so you don't have to be a cost expert to see when you can make $80 to $85 additional and for handling a car lesser distance, that it is profitable.

The rail carriers submitted comparisons of rates and earnings for similar services in the same or adjacent territories to show that the proposed reduced rates were reasonably compensatory. This has always been

[35] The reshipping rates, 49 cents on corn and 49.5 cents on corn products applies from Chicago to the east including routing through Kankakee (R. 303).

considered probative evidence as to the lawfulness of rates in issue. *United States* v. *Northern Pacific Ry.*, 288 U.S. 490, 500; *Youngstown Sheet & Tube Co.* v. *United States*, 295 U.S. 476, 480. The Commission found that under the proposed rates the revenues of the NYC are increased by 7.5 cents per 100 pounds over its prior method of handling corn from Chicago, and that its expenses are reduced to the extent that corn from Belt origins can move direct to eastern destinations (R. 24–25). This finding does not show a reduction in losses—what it shows is an addition to revenues. From the foregoing there is no basis for the allegation that the proposed rates are non-remunerative.

The record in this case demonstrates that the proposed reduced rates are neither predatory nor in contravention of the National Transportation Policy. Mechling contends (Mechling Br., p. 42) that the result of the Commission's action is to cause a disruption of a long standing rail rate structure in Northern Illinois. A similar allegation by this Commission was rejected by this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

The National Transportation Policy, 49 U.S.C. preceding section 1, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3(1), 49 U.S.C. 3(1), provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm,

corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 3(4), 49 U.S.C. 3(4), provides:

All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Section 4(1), 49 U.S.C. 4(1), provides:

It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive

as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further,* That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further,* That tariffs proposing rates subject to the provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

Section 13(1), 49 U.S.C. 13(1), provides:

That any person, firm, corporation, company, or association, or any mercantile, agricultural or manufacturing society or other organization,

or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(7), 49 U.S.C. 15(7), provides:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification of any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and

delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

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